



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA**

**(BIMA TOWERS)**

**CAUSE NO. 214 OF 2013**

**MARY KASIWA**

**CLAIMANT**

**v**

**SCORPIO ENTERPRISES LIMITED**

**RESPONDENT**

**RULING**

1. The Claimant was employed by the Respondent at a date not stated in the Memorandum of Claim. But she was terminated sometime in July 2006.
2. On 22 July 2013 the Claimant lodged a claim for unlawful termination in Court. The Claim was served upon the Respondent and on 26 July 2013 it entered Memorandum of Appearance through Kiarie Kariuki & Co. Advocates.
3. On 7 August 2013 the Respondent filed a Notice of Preliminary Objection to the Claim on the ground that the cause of action was time barred under the provisions of section 90 of the Employment Act. It was stated in the objection that the Court therefore lacked jurisdiction and that the Claimant's right to sue had lapsed and therefore the Claim was an abuse of court process.
4. The objection was prosecuted on 2 September 2013 and on 30 September 2013 the Respondent furnished the Court with authorities it sought to rely on.
5. The Respondent's case was that because the cause of action arose in July 2006 it should have been filed within 3 years pursuant to section 90 of the Employment Act.
6. For the Claimant, it was submitted that the Employment Act, 2007 came into force on 2 June 2008 and that because the cause of action arose in 2006 the applicable law is the Limitation of Actions Act.
7. The Claimant further submitted that the Court would be sanctioning unfair labour practices if the Preliminary Objection was allowed because Article 41 of the Constitution enshrines workers right to fair labour practices.
8. At the time of dismissal of the Claimant, the Employment Act, 2007 was not in operation.
9. The statute governing employment relationships was the Employment Act, cap 226 (now repealed). The repealed statute did not make any provision in regard to limitation of causes of action arising out of contract of services.
10. Therefore the Claimant was right to submit that the applicable statute was the Limitation of Actions Act. In any case section 90 of the Employment Act does not have retrospective application.
11. I have had occasion to deal with the issue whether section 90 of the Employment Act has retrospective operation in *Charles Kiruthi Mwangi v G4S Security Services Ltd* (2012) eKLR and It is apt for me to repeat what I stated in the *Kiruthi* case.
14. It cannot be denied that the cause of action herein is based on a contract of employment. The

Claimant's services were terminated on 27 April 2006. Six years from the date of his termination would have expired on 26 April 2012. Before the commencement of the Employment Act, 2007, the Claimant would have been acting on sound legal footing that the expiry period for him to initiate a claim for breach of the contract of service was on or before 26 April 2012. The Limitation of Actions Act gave him that assurance.

15. And was it the intention of the legislature in section 90 of the Employment Act, 2007 to take away that assurance? I don't think so. I say so on the basis of the decision of the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara* (1982) 3 All ER 833, that such interpretation would be depriving and impairing the Claimant of his accrued cause of action/right. This is because such a construction would inflict a detriment upon persons in the position of the Claimant while conferring a benefit upon the Respondent, which benefit has put the Claimant in a disadvantage. It would also not be fair.

16. I express my approval as the correct legal position the holding in *Philips v Eyre* (1870) LR QB 1 which was cited with approval by Nyamu J. in *Keroche Industries Ltd v Kenya Revenue Authority & 5 others* (2007) eKLR that:

Retrospective laws are no doubt prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law: Accordingly the Court will not ascribe retrospective force to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature.

17. Section 4(1) of the Limitation of Actions Act amended by section 90 of the Employment Act 2007 is not merely procedural but substantive provision. It affects rights which persons such as the Claimant enjoyed. It is a general presumption at common law and rule of statutory interpretation that statutes should not be interpreted to operate retrospectively unless there is express intention by the legislature. I take umbrage for this position in the *per curiam* holding in the *Yew Tew Bon* case (supra).

18. In this regard the Interpretation and General Provisions Act, Cap 2 is also material. The Act in Section 23 provides:

(1) Where in a written law a reference is made to another written law, that reference shall, except where the context otherwise requires, be deemed to include a reference to the last-mentioned written law as it may from time to time be amended.

(2) Where a written law repeals and re-enacts, with or without modification, a provision of a former written law, references in another written law to the provisions so repealed shall, unless a contrary intention appears, be construed as references to the provision so re-enacted.

**(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not -**

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

**(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or**

**(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or**

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or....

12. Having looked at the above cited authorities, statutory provisions and the submissions on record, it

is my considered opinion that it is only contracts of service terminated after the commencement of the Employment Act, 2007 which must be brought to Court within three years as expressed in section 90.

13. In my humble opinion I do not agree with the holding in *Kenya Scientific Research International & Allied Workers Union v T N S Research International Ltd, Industrial Court Cause No. 27(N) of 2010 that contracts ranging between 1999 – 2005 were time barred and that the Court has no mandate to enforce rights accrued outside the time limits set under section 90.*

14. Such contracts remain to determined under the repealed Employment Act, Cap 226, if they were brought within the time allowed for under the Limitation of Actions Act.

In the instant case, the Claimant should have filed her claim on or before July 2012, but instead she filed the Cause on 22 July 2013. The Claim was filed outside the 6 year period and it must be struck out.

16. Before concluding I must mention that Mr. Panyako for the Respondent while relying on the provisions of section 90 of the Employment Act, 2007 in raising the objection in the instant case at the same time and on the same day in Petition No.1 of 2013, *Josephat Ndirangu v Henkel Chemicals (EA) Ltd* and Industrial Cause No. 49 of 2013, *Josephat Ndirangu v Henkel Chemicals (EA) Ltd* sought that I declare section 90 of the Employment Act unconstitutional.

17. I need to say that counsels have their clients' instructions but they must not blow hot and cold at the same time regarding the law. The law must remain consistent for all clients and counsels must bear in mind that they are officers of the court with clear duties to the law.

### **Conclusion**

18. For the reasons adumbrated herein above I strike out the Memorandum of Claim filed in Court on 22 July 2013 without an order as to costs.

**Delivered, dated and signed in open Court in Mombasa on this 8<sup>th</sup> day of November 2013.**

**Radido Stephen**

**Judge**

**Appearances**

Mr. Koech instructed by Gicharu

Kimani & Co. Advocates

for Claimant

Mr. Panyako instructed by Kiarie

Kariuki & Co. Advocates

for Respondent